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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARK LEON PEREZ, Defendant and Appellant.	F061961 (Fresno Sup. Ct. No. F09903722) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Gabriel Bassan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, William K. Kim, Kathleen A. McKenna, and Tiffany J. Gates, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Mark Perez was convicted after a jury trial of unlawfully taking or driving a car (Veh. Code, § 10851, subd. (a)), two counts of first degree

residential burglary (Pen. Code,[1] §§ 459/460, subd. (a)), and several misdemeanor offenses. Defendant committed all of the offenses within a few hours on the morning of June 27, 2009. He was sentenced to an aggregate term of six years in prison. On appeal, he raises several sentencing issues. We will affirm.

FACTS

Burglary and car theft at the Garcias' residence (Counts I, II, III, and V)

Everardo Garcia[2] (Everardo) and his sister, Floricel Garcia (Floricel), lived together at a residence on North Sherman in Fresno. Around 2:00 a.m. on June 27, 2009, Everardo was in bed when he heard noises by an interior door. He got up, put on both the interior and exterior lights, looked in the backyard, and did not see anything. Floricel's red Acura was parked in the garage, and Everardo's Jeep was parked in front of the house, near the garage driveway.

Everardo went into the kitchen and found Floricel preparing milk for her baby. He didn't say anything to Floricel about the noise because he didn't want to frighten her. He decided to activate his car alarm to make some noise outside, but he could not find his car keys. Instead, he turned on the front lights and went back to bed.

Floricel went into the garage, threw out the baby's diaper, and took the baby back into her bedroom. About 15 minutes later, she heard the garage door open and her car start. She looked outside and saw her red Acura being backed out of the garage at a fast rate of speed. She heard a crash and realized the Acura hit the Jeep as it backed out of the driveway. She saw a Hispanic male with short hair driving the Acura, but she could not see his face. She believed the suspect was not a very good driver because she could hear the Acura's gears shifting and grinding.

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

[2] We refer to some of the parties by their first names for the sake of clarity; no disrespect is intended.

Floricel called Everardo's cell phone for help and told him what she saw. Everardo, who was back in his bedroom, got up and went to the garage, and discovered the Acura was gone. The children's car safety seats, which had been installed in the Acura, had been removed from the vehicle and left behind in the garage. Everardo looked around the house and realized the Acura's keys were missing. The keys had been hanging in a kitchen cabinet near the garage door. The plasma television and remote control had been taken from the living room. Everardo also realized the backdoor to the garage had been unlocked.

Everardo's Jeep was still parked in front of the house but the front bumper had been damaged when the Acura backed into it. Everardo discovered footprints across his wet back lawn, leading from the back fence to the patio.

Around 4:00 a.m., Floricel called the police department. As we will explain *post*, defendant was later apprehended as he ran from the stolen Acura.

Based on the incident at the Garcias' house, defendant was charged and convicted of count I, first degree residential burglary, with the special allegation that another person was present in the residence during the commission of the offense (§ 667.5, subd. (c)(21)); count II, unlawfully taking or driving an automobile (§ 10851, subd. (a)), Floricel's Acura; and count V, misdemeanor hit and run of Everardo's Jeep (Veh. Code, § 20002, subd. (a)).

Defendant was also charged with count III, receiving a stolen vehicle, the Acura (§ 496d, subd. (a)). He was found not guilty of that offense.[3]

[3] The jury was instructed that counts II and III were alternate charges, and defendant could not be convicted of both offenses.

Apprehension of defendant (counts VI and VII)

At 4:13 a.m., Fresno Police Sergeant Douglas Goertzen was on patrol and heard the dispatch about the burglary and car theft at the Garcias' house. He drove around the area to look for the stolen vehicle.

About one block away from the Garcias' house, Sergeant Goertzen saw a red Acura parked in front of a residence on North Orchard. Goertzen pulled his patrol car behind the Acura and illuminated the vehicle with his spotlight. Defendant got out of the Acura, looked at Goertzen, and immediately ran away.

Sergeant Goertzen chased defendant on foot, repeatedly identified himself as a police officer, and ordered him to stop. Defendant ignored the orders and kept running. Defendant carried a black backpack. Other officers and a K-9 unit arrived and joined in the pursuit as defendant jumped fences and ran through backyards.

During the pursuit, defendant entered a house on North Angus by opening an unlocked sliding glass door and running inside. The startled residents shouted at him and he ran out.

About 10 minutes after the chase began, Officer Miranda found defendant on top of a residential roof, and ordered defendant to stop. Defendant again ignored the orders and tried to jump to the roof of the adjoining house. Defendant did not make it and fell just short. The officers found defendant lying on the ground. Defendant still had the black backpack.

Defendant was screaming for help and said that he had broken his leg. Defendant spontaneously said he did not do anything wrong, and he was running "because the cops were chasing him."

Based on this incident, defendant was charged and convicted of count VI, misdemeanor resisting arrest (§ 148, subd. (a)(1)); and count VII, misdemeanor aggravated trespass of the North Angus house (§ 602.5, subd. (b)).

Discovery of Burglary at North Orchard residence (count IV)

After defendant was apprehended, Sergeant Goertzen returned to the red Acura, which was still parked in front of the North Orchard residence. Goertzen found a large plasma television inside the vehicle. About 10 feet away from the Acura, Goertzen found a suitcase and another television in the residence's driveway. The suitcase contained personal possessions.

Sergeant Goertzen and Officer Tumoine looked around the North Orchard residence and discovered that a sliding door was unlocked, windows were open, and window screens had been removed. There were newspapers stacked at the front door. They entered the house, determined that no one was home, and saw an empty television stand and dangling wires.

Defendant was charged and convicted of count IV, first degree burglary of the North Orchard residence.

Recovery of stolen goods

A few hours after the burglary of their house, Everardo and Florical identified the red Acura as the vehicle which had been stolen from the garage. It had been damaged on the passenger side when it crashed into the Jeep. Their plasma television and remote control were inside the vehicle.

Charles Renberg lived at the North Orchard house, and he had been out of town at the time of the burglary. His family identified the television and suitcase found on the driveway, the black backpack found with defendant, and items found inside the suitcase and backpack, as property that was stolen from his house.

Defendant's postarrest statement

Detective Brandi Phebus interviewed defendant at the hospital, where he was admitted for a shattered leg after falling off the roof. Phebus advised defendant of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, and he agreed to answer

questions. Phebus asked defendant what happened. Defendant initially said he was a passenger in the vehicle. Phebus told defendant that wasn't true.

Defendant denied breaking into any houses. Defendant explained that he had been drinking at a friend's apartment that night. Defendant said he started acting stupid and his friend told him to leave. Defendant said he left and then woke up on the grass near the apartment complex. He wanted to take a shower, went to a house, found an unlocked front door, and walked inside. Defendant could not remember what he did inside the house, but he knew that he left and jumped over the fence to a second house. Defendant said he entered the second house's unlocked back door, grabbed keys off the wall, and started the car. Defendant said it was hard to drive the car because it had a stick shift, but he managed to drive away.

Defendant said he drove to a fast food restaurant, realized he did something wrong, and decided to return the car. Defendant said he was trying to return the car when he saw the police lights behind him.

Detective Phebus asked defendant if he went back to the North Orchard house to pick up the property he had already stacked in the driveway. Defendant said he went to the North Orchard house to return the car and got confused with the streets. Phebus asked defendant about the stolen backpack that he was carrying when he was apprehended. Defendant said he wasn't sure if it was his backpack. Defendant also said there might have been some coins in the backpack that were from the first house that he entered.

Detective Phebus asked defendant about the television in the car. Defendant said the car and the television were from the second house he entered, the North Sherman residence. Defendant admitted he loaded the television in the car, grabbed the car keys, and took the car.

Conviction and sentence

As noted, *ante*, defendant was convicted of count I, burglary of the Garcias' house; count II, unlawfully taking or driving Floricel's Acura; count IV, burglary of the North Orchard house; count V, misdemeanor hit and run of Everardo's Jeep; count VI, misdemeanor resisting arrest; and count VII, misdemeanor aggravated trespass of the North Angus house.

Defendant was sentenced to the aggregate term of six years as follows: count I, the midterm of four years for burglary; count II, a consecutive term of eight months (one-third the midterm) for unlawfully taking or driving a car; and count IV, a consecutive term of one year four months (one-third the midterm) for burglary of the North Orchard residence. He was sentenced to 365 days in jail for the remaining misdemeanor counts.

DISCUSSION

I. Consecutive sentences for counts I and II

Defendant contends the court improperly imposed consecutive sentences for count I, burglary of the Garcias' house, and count II, unlawfully taking or driving Floricel's car from the Garcias' garage. Defendant argues that count II should have been stayed pursuant to section 654 because both crimes were committed incident to one objective.

A. The charges

As set forth *ante*, based on the incident at the Garcias' house, defendant was charged with count I, first degree residential burglary; count II, unlawfully taking or driving an automobile, Floricel's Acura; and count III, receiving a stolen vehicle, the Acura (§ 496d, subd. (a)). Defendant was not separately charged with the theft of the Garcias' television set.

As to count II, the jury was instructed that defendant was charged with unlawfully taking or driving the vehicle without the owner's consent, with the intent to deprive the owner of possession or ownership for any period of time. The jury was instructed that

counts II and III were alternate charges, and defendant could not be convicted of both offenses.

Based on the incident at the North Orchard residence, defendant was charged with count IV, first degree burglary.

B. Closing arguments

In his closing argument, the prosecutor generally addressed the elements of both burglary charges, that defendant entered the houses with the intent to commit theft. He further argued that when defendant took Floricel's car, he had already burglarized the North Orchard residence and left stolen property on the driveway of the North Orchard residence:

> "I think if you look at this case as a whole in toto—the fact that he took a car, the fact that he took the items out of a car—the baby seats out of the car, *he had other stolen property waiting at another location to be picked up*, shows that this was a planned burglary of these places; and that when he went in, he stole." (Italics added.)

The prosecutor also addressed count II, unlawfully taking or driving a vehicle and argued defendant's guilt was "pretty obvious" since he admitted taking Floricel's car. "Even if he meant to return the vehicle—if he took it without permission for any period of time, that is auto theft." The prosecutor clarified that defendant could not be convicted of both count II, unlawfully taking or driving, and count III, receiving the stolen vehicle:

> "What I would argue is if you think he unlawfully drove the vehicle, the [section 10851] charge is the one to go with.… But if [you] don't think I had proven that he drove the vehicle and only that he possessed the vehicle, then you go with this charge [of receiving]."

Defense counsel argued defendant was intoxicated and in the "wrong place at the wrong time."

In his rebuttal argument, the prosecutor argued defendant was guilty of both burglary charges because he entered both houses with the specific intent to commit theft.

The prosecutor again asserted that defendant broke into the North Orchard residence before he stole Floricel's car.

> "[T]he fact that he is piling loot on the driveway [at the North Orchard residence], negotiating houses, open[ing] garage doors, driving vehicles, stealing keys, carrying backpacks[,] loading stolen property, that all shows that he has got that intent there. This is not somebody that went in a drunken stupor and crashed at somebody's house. This is somebody that is stealing property."

The prosecutor further argued that when defendant removed the children's seats from Floricel's car, that showed his "intent for theft to put more stolen goods" in the car. When the police found defendant in Floricel's stolen car, he had stopped "right next to the stolen property [on the driveway at the North Orchard residence] where the luggage and TV was found. If he is not involved in these thefts, why would he pick that place to stop? Right next to the other residential burglary."

Defendant was convicted of both burglary charges. He was also convicted of count II, unlawfully taking or driving, and found not guilty of count III, receiving the stolen car.

C. <u>Sentencing hearing</u>

At the sentencing hearing, defense counsel argued that the sentence for count II, unlawfully taking or driving Floricel's car, should be stayed pursuant to section 654 because defendant had the same theft-related intent when he committed that offense and count I, burglary of the Garcias' residence. Counsel argued that defendant's conduct of taking the car keys and driving away with the car was part of the residential burglary because "[t]he garage was attached. It was part of the crime … of the taking of the vehicle out of the garage of the home that he burglarized. That particular act and the fact that he loaded up a TV into the car was one course of conduct," and section 654 required the sentence for count II to be stayed.

The prosecutor replied that defendant's argument would be correct if he had been convicted of receiving a stolen vehicle. However, the jury found defendant not guilty of

that alternate charge in count III, and instead convicted defendant of unlawfully taking or driving Floricel's car in count II. The prosecutor argued there was no evidence that defendant committed the burglary of the Garcias' house with the specific intent just to steal the car, particularly since he had already stolen the television from their house. In addition, defendant was seen driving away from the house in the stolen car.

The court decided that section 654 did not apply to the sentences for counts I and II.

> "I understand the [section 654] argument, but hearing the evidence in this case, I don't believe that it is applicable. [Defendant] intentionally burglarized that home. He removed property, and then subsequently made the decision after stealing the keys to steal the car. I don't think it is the same course of conduct for [section] 654 purposes."

The court imposed the midterm of four years for count I, burglary of the Garcias' residence, a consecutive term of eight months for count II, unlawfully taking or driving the car, and a consecutive term of one year four months for count IV, burglary of the North Orchard residence.

D. Section 654

Section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

The protection of section 654 has been extended to cases where a single act or omission has occurred, or where there are several offenses committed during a course of conduct deemed to be indivisible in time. (*People v. Le* (2006) 136 Cal.App.4th 925, 931-932.) "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The defendant may be found to have harbored a single intent if the offenses were merely incidental to, or were the means of

accomplishing or facilitating one objective, resulting in the defendant being punished only once. (*Ibid.*) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) When there is no dispute as to the facts or the inferences drawn therefrom, the application of section 654 is a question of law. (*People v. Stringham* (1988) 206 Cal.App.3d 184, 202.)

E. <u>Application of section 654 to burglary and underlying offenses</u>

A defendant may be convicted of both burglary and theft, since a burglary may be committed without committing a theft, and theft is not a lesser included offense of burglary. (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458; *People v. Allen* (1999) 21 Cal.4th 846, 865-867) However, "section 654 has been held to preclude punishment for both burglary and theft where,… the burglary is based on an entry with intent to commit that theft. [Citations.]" (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) Similarly, "the taking of several items during the course of a robbery may not be used to furnish the basis for separate sentences." (*People v. Bauer* (1969) 1 Cal.3d 368, 376-377.) A defendant may not be punished for both a robbery and burglary where the sole purpose of the burglary was to effectuate the robbery. (*People v. Smith* (1985) 163 Cal.App.3d 908, 912.)

"Burglary consists of entry into a house or other specified structure with the intent to commit a felony. (Pen. Code, § 459.) Thus, ordinarily, if the defendant commits both burglary and the underlying intended felony, … section 654 will permit punishment for one or the other but not for both. (*People v. Price* (1991) 1 Cal.4th 324, 492 [burglary and intended murder] … ; *People v. James* (1977) 19 Cal.3d 99, 119-120 [burglary and intended robbery]; *In re McGrew* (1967) 66 Cal.2d 685, 688 [burglary and intended sexual offenses]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1336 [burglary and intended theft]; *People v. Curtin* (1994) 22 Cal.App.4th 528, 532 [burglary and intended forgery]; *People v. Radil* (1977) 76 Cal.App.3d 702, 713 [burglary and intended assault]; *People v. Williams* (1971) 19 Cal.App.3d 339, 345 [burglary and intended arson].)" (*People v. Centers* (1999) 73 Cal.App.4th 84, 98-99; see also *In re Maurice H.* (1980) 107 Cal.App.3d 305, 312 [burglary and auto theft "an indivisible transaction with one objective, theft"]; *People v. Bernal, supra,* 22 Cal.App.4th at p. 1458 [section 654 barred multiple punishment for burglary and petty theft for stealing a car stereo from a bedroom].)

For example, in *People v. McFarland* (1962) 58 Cal.2d 748, the defendant burglarized a hospital and stole an air compressor. He was convicted and sentenced for both burglary and grand theft. (*Id*. at p. 758.) *McFarland* held he could not be punished for both offenses. "The inference which the jury was permitted to draw ... was that defendant entered the hospital with intent to steal and that the taking of the air compressor was the culmination of that intent. The record contains nothing indicating that he entered the hospital with intent to commit some crime other than theft. In these circumstances the only reasonable conclusion is that the entry of the hospital and the taking of the air compressor were parts of a continuous course of conduct and were motivated by but one objective, theft; the burglary, although complete before the theft was committed, was incident to and a means of perpetrating the theft." (*Id.* at p. 762.)

In *People v. Bauer, supra*, 1 Cal.3d 368, the defendant entered a home lived in by three women, robbed them each of personal property kept in the house, then stole one of the victims' car. *Bauer* held the defendant could not be separately punished for robbery and auto theft.

> "[W]here a defendant robs his victim in one continuous transaction of several items of property, punishment for robbery on the basis of the taking of one of the items and other crimes on the basis of the taking of the other items is not permissible. [¶] The Attorney General urges that the separate sentences for robbery and car theft may be upheld on the theory that the robbery was complete before the theft of the car began and that the theft of the automobile was an afterthought to the original transaction. The fact that one crime is technically complete before the other commenced does not permit multiple punishment where there is a course of conduct comprising an indivisible transaction. [Citation.] And the fact that one of the crimes may have been an afterthought does not permit multiple punishment where there is an indivisible transaction.... Moreover, the evidence in the instant case does not show that the theft of the car was an afterthought but indicates to the contrary that the robbers, who while ransacking the house were carrying the stolen property to the garage, formed the intent to steal the car during the robbery if not before it." (*Id.* at p. 377.)

In *People v. Beamon* (1973) 8 Cal.3d 625, the defendant assaulted a truck driver, took the keys, drove away, and held the driver as a hostage. The defendant was convicted and sentenced for both robbery and kidnapping for the purpose of robbery. *Beamon* held he could not be sentenced for both offenses: "We are compelled to the conclusion as a matter of law that on the record here both crimes were committed pursuant to a single intent and objective, i.e., to rob [the driver] of the truck or its contents." (*Id*. at p. 639.)

In *People v. Perry* (2007) 154 Cal.App.4th 1521, the victim returned to his car to find the defendant inside it. The defendant jumped out of the car holding the victim's car stereo in one hand and a screwdriver or ice pick in the other. The defendant ran, the victim chased him, and he managed to tackle the defendant. (*Id*. at p. 1523.) *Perry* held that the defendant's objective in committing both the burglary and robbery was the theft of the car stereo. The robbery was committed when the victim confronted the defendant

at the car and the defendant adopted a " 'fighting stance' " while holding the screwdriver or ice pick. (*Id.* at p. 1527.) "Although the robbery entailed a different type of action, i.e., the implied threat to use the screwdriver or ice pick, the underlying objective was necessarily identical: to steal [the victim's] car stereo." (*Ibid.*)

> "[I]f property is taken during a burglary[,] and a robbery pertaining to the same property is committed during the escape, the objective is still essentially to steal the property. Admittedly, an additional objective of preventing the victim or another person from taking back the property generally will exist, but may be incidental to, rather than independent of, the objective of stealing the property." (*Id.* at pp. 1526-1527.)

F. <u>Cases in which section 654 was found inapplicable</u>

In contrast to *Bauer*, a different result was reached as to burglary in *People v. Bowman* (1989) 210 Cal.App.3d 443 (superseded by statute on other grounds as explained in *People v. Green* (2011) 197 Cal.App.4th 1485, 1492-1493), where the defendant broke into a car dealership and stole supplies from the dealership office. He then broke into various motor homes and vehicles, and removed electronic equipment and other items from their interiors. He received eight consecutive sentences for the second degree burglary convictions. (*Id.* at pp. 445-446.) *Bowman* held the consecutive sentences were not prohibited by section 654 because the defendant "entertained multiple criminal objectives." (*Id*. at p. 449.) "Here [the] defendant did not commit a single break-in as contended, but rather committed multiple break-ins, each with a separate felonious intent. While the felonious intent in each instance was the same, this does not make the various violations incidental to each other or to one primary criminal objective. Thus, even though the violations were part of an otherwise indivisible course of conduct in that they occurred during one night, it was within the trial court's discretion to impose consecutive sentences." (*Id.* at p. 448.)

In *People v. O'Keefe* (1990) 222 Cal.App.3d 517, the defendant was separately punished for five residential burglaries of dormitory rooms within one dormitory. The court concluded that section 654 did not bar multiple punishments for each burglary

because each dormitory room was a separate dwelling pursuant to section 459, and entry into each was separate and divisible conduct. (*Id*. at p. 522.)

G. Analysis

If the circumstances in this case were limited to count I, burglary of the Garcias' house, and count II, unlawfully taking or driving Floricel's vehicle, it might seem that *Bauer* would require application of section 654 to stay the sentence imposed for count II. Defendant burglarized the Garcias' house and entered with the intent to steal. He took their television, found the keys to Floricel's car, removed the children's seats from the vehicle, put the television in the car, and drove away in the vehicle.

As explained *ante*, however, if a defendant entertained multiple criminal objectives that were independent and not incidental to each other, he "may be punished for each statutory violation committed in pursuit of each objective" even though the violations were otherwise part of an indivisible course of conduct. (*People v. Harrison, supra,* 48 Cal.3d at p. 335.) As the prosecutor explained in closing argument, this case was not limited to the single burglary of the Garcias' house. Shortly after taking Floricel's car, defendant was found in that vehicle while parked in front of the North Orchard residence, which was near the Garcias' house. The police found a suitcase and another television about 10 feet away from the stolen vehicle, situated in the driveway of the North Orchard residence. The television and suitcase had been stolen during the burglary of the North Orchard residence, and the suitcase contained property which had also been stolen from that house.

The facts strongly suggest that defendant burglarized the North Orchard residence, stacked up the stolen property on the driveway, and was going to load it in Floricel's vehicle. The prosecutor asserted that given the limited time span, defendant had likely burglarized the North Orchard house before he broke into the Garcias' home and took Floricel's vehicle. Under either factual inference, defendant clearly had multiple objectives when he committed counts I and II: to burglarize and steal property from the

Garcias' house, and to find a way to transport the stolen property from other houses which he had, or was about to, burglarize that night. The court properly imposed consecutive sentences for counts I and II.

II. Revocation of defendant's driver's license

Defendant contends the court failed to understand the scope of its discretion when it ordered his driver's license revoked pursuant to Vehicle Code section 13357, and it improperly delegated its statutory authority to the Department of Motor Vehicles (DMV) when it made the order.

A. Background

The probation report included the recommendation that defendant's driving privilege should be revoked pursuant to Vehicle Code section 13357, based on his conviction in count II for violating Vehicle Code section 10851, unlawfully taking or driving Floricel's car.

At the sentencing hearing, the court imposed the six year prison term and then stated: "Defendant's driving privilege is revoked." Defense counsel argued it was not necessary to suspend or revoke defendant's license given the length of his prison term. Defense counsel also argued the court had to specify the length of any revocation period, and thought the maximum period was three years.

The court replied: "I will simply [be] ordering that the license is revoked consistent with DMV action. I will let DMV handle that."

B. Analysis

Vehicle Code section 13357 states:

> "*Upon the recommendation of the court* the department [of motor vehicles] shall suspend or revoke the privilege to operate a motor vehicle of any person who has been found guilty of a violation of [Vehicle Code] Section 10851." (Italics added)

Defendant argues the court improperly delegated its discretion to revoke his license to the DMV. To the contrary, the entirety of the record demonstrates that the

court was well aware of its discretion pursuant to Vehicle Code section 13357. Based on defendant's conviction for violating Vehicle Code section 10851, the court recommended that DMV revoke defendant's license.

The court's exchange with defense counsel was based on defense counsel's mistaken belief that the court had to state a period for which defendant's license would be revoked. Defense counsel's argument was likely based on other provisions of the Vehicle Code which specifically defines the number of years for which a driver's license is subject to suspension or revocation. (See, e.g., Veh. Code, § 13202 [upon conviction of certain controlled substance offenses, the court shall specify suspension or revocation period but period shall not exceed three years]; Veh. Code, § 13202.4 [suspension for five years upon minor's conviction for public offense involving concealable firearm]; Veh. Code, § 13202.5 [one year suspension upon minor's conviction for drug and alcohol related offenses]; Veh. Code, § 13202.6 [suspension for not more than two years with certain exceptions upon minor's conviction for certain vandalism offenses]; Veh. Code, § 13210 [suspension of six months/one year upon conviction of assault on operator of another vehicle]; Veh. Code, § 13350 [mandatory suspension of at least one year upon conviction of certain offenses]; Veh. Code, § 13351 [revocation with no reinstatement for three years upon conviction of vehicular manslaughter and other specific offenses]; but see Veh. Code, § 13351.5 [revocation with no reinstatement upon conviction for assault with a deadly weapon, a vehicle].)

The court recommended revocation of defendant's license pursuant to Vehicle Code section 13357, which does not state a minimum or maximum period of revocation. The court was not required to state such a period, and the court did not improperly delegate its discretion to the DMV.

III. Cost of probation report

Defendant next contends the court improperly ordered him to pay the presentence report fee without finding that he had the ability to pay that fee.

A. Background

The probation report recommended that defendant pay a presentence report fee of $296 pursuant to section "1203.1(b)[*sic*]."

At the sentencing hearing, the court made the following orders as to fees and fines:

> "Imposing a $70 court fee per count. Order that paid within 30 days of his release from custody, and fees and fines for the preparation of the presentence report as well."

Defense counsel did not object to the court's order.

B. Analysis

Defendant argues the court's order must be reversed because it never found he had the ability to pay the cost for preparation of the presentence report. Section 1203.1b, subdivision (a) permits the sentencing court to order defendant to pay the reasonable costs of the preparation of any presentence probation report.

> "The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." (§ 1203.1b, subd. (a).)

If the defendant does not waive his right to a hearing, the probation officer is to refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payment shall be made. (§ 1203.1b, subd. (b).)

In *People v. Valtakis* (2003) 105 Cal.App.4th 1066 (*Valtakis*), the court held that defendant's failure to object to fees imposed, pursuant to section 1203.1b, waived the error on appeal. *Valtakis* found that the antiwaiver language in the statute did not speak to appellate review and that counsel still needed to preserve claims for appellate review by lodging an appropriate objection. (*Valtakis*, *supra*, at p. 1075.) *Valtakis* further held

that defendant's failure to object at the sentencing hearing to noncompliance with section 1203.1b's statutory procedures constituted a waiver of the claim on appeal, consistent with the general waiver rules discussed in *People v. Welch* (1993) 5 Cal.4th 228 (*Welch*) and *People v. Scott* (1994) 9 Cal.4th 331:

> "[T]o construe the language [in the statute] as abrogating *Welch* and *Scott* ... would work results horribly at odds with the overarching cost conservation policy of the section. 'Statutes should be construed to produce a reasonable result consistent with the legislative purpose. [Citation.] The object to be achieved and the evil to be prevented are prime considerations in determining legislative intent.' [Citation.] If needed to avoid absurd consequences, the intent of an enactment prevails over the letter and the letter will, if possible, be read so as to conform to the spirit of the act. [Citation.] Here the antiwaiver language that helps shield defendants against fees beyond their ability to pay subserves a greater purpose of conserving the public fisc [citations], a purpose that would be sacrificed if we adopted [the defendant's] reading. Criminal defendants often lack the means to pay high recoupment fees, and so the amounts imposed are relatively modest in most of the cases we see. To allow a defendant and his counsel to stand silently by as the court imposes a $250 fee, as here, and then contest this for the first time on an appeal that drains the public fisc of many thousands of dollars in court and appointed counsel costs, would be hideously counterproductive. It would also be completely unnecessary, for the Legislature has provided mechanisms in section 1203.1b for adjusting fees and reevaluating ability to pay *without an appeal* anytime during the probationary period [citation] or the pendency of any judgment [citation]." (*Valtakis, supra,* 105 Cal.App.4th at pp. 1075-1076, italics in original.)

In *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*), the Supreme Court held that a defendant can raise, without a prior objection, a claim that the finding of probable cause to require HIV testing is not supported by substantial evidence. (*Id.* at pp. 1126-1127.) In his concurring opinion, Justice Baxter, joined by Justice Chin, wrote separately "only to make explicit what is implicit in the majority opinion. [¶] [I]t remains the case that *other* sentencing determinations may not be challenged for the first time on appeal.... This includes claims that the record fails to demonstrate the defendant's ability to pay a fine [citations]." (*Id.* at p. 1130, conc. opn. of Baxter, J.)

We agree with the reasoning of *Valtakis* that defendant's failure to object at sentencing to the imposition of fees pursuant to section 1203.1b forfeits his claim on appeal. (See *Welch, supra,* 5 Cal.4th at p. 235.) Moreover, defendant was advised in the probation officer's report about the recommendation for the presentence report fees. Defendant failed to raise the issue of ability to pay during the sentencing hearing either before or after the trial court made its ruling. If defendant had raised the issue, the court could have made factual findings at the sentencing hearing concerning defendant's ability to pay. There was no reason why defendant could not have raised these same objections to the court's noncompliance with the presentence report fee procedures at the conclusion of sentencing, rather than standing by silently as the court imposed the fees, and then contesting this for the first time on appeal, a practice that the *Valtakis* court described as "hideously counterproductive" and "unnecessary." (*Valtakis, supra,* 105 Cal.App.4th at p. 1076.)

Defendant relies on *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*) and asserts he did not waive the issue. In *Pacheco*, the Sixth District addressed defendant's claims that the trial court erroneously imposed various statutory fees, including a $64 per month probation supervision fee under section 1203.1b, "without determining his ability to pay these fees and that there [was] insufficient evidence to support any such determination." (*Pacheco, supra,* at p. 1397.) *Pacheco* allowed the defendant to raise these issues on appeal, despite his failure to first object to the absence of an ability to pay determination in the trial court. (*Ibid.*) *Pacheco* reasoned that since the defendant's claims were "based on the insufficiency of the evidence to support the order or judgment. [S]uch claims do not require assertion in the court below to be preserved on appeal. [Citations.]" (*Ibid.*)

We agree with the general proposition in *Pacheco* that sufficiency of the evidence claims are preserved for appeal even in the absence of an objection at the trial level. Defendant attempts to place this case within *Pacheco* by arguing that he is raising a

substantial evidence challenge since "there is no evidence in the record to sustain [the court's] order." However, the entirety of defendant's appellate argument demonstrates that his actual challenge to the court's order is based on the court's alleged violation of the statutory procedures set forth in section 1203.1b.

We decline to follow *Pacheco* on the issue as to defendant's failure to object because we believe *Pacheco* is inconsistent with *Valtakis* and *Butler* and the authorities cited in those opinions.

In the alternative, defendant contends that defense counsel's failure to object constituted ineffective assistance of counsel. "To establish ineffective assistance, defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him. [Citations.]" (*People v. Hawkins* (1995) 10 Cal.4th 920, 940, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110 and *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) As noted by the People, the burden of proving ineffective assistance of counsel is on the defendant. (*People v. Rios* (2011) 193 Cal.App.4th 584, 595.) On this record, defendant has failed to show a reasonable probability that the court would have found he lacked the ability to pay or that the court would not have imposed the fee if defense counsel objected.

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Gomes, Acting P.J.

_____
Detjen, J.